No. 83-1721

In the Supreme Court of the United States

October Term, 1983

STATE OF MISSOURI, et al.,
Petitioner,

vs.

CRATON LIDDELL, et al.,
Respondent.

BRIEF AMICI CURIAE IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI ON BEHALF OF THE STATES OF ARKANSAS, ALABAMA, ARIZONA, CALIFORNIA, DELAWARE, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, LOUISIANA, MICHIGAN, MISSISSIPPI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, OREGON, TENNESSEE, TEXAS, UTAH, WASHINGTON, WEST VIRGINIA, WYOMING

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INTEREST OF AMICI CURIAE

The State of Missouri has petitioned for review of a decision by the Eighth Circuit imposing heavy financial burdens to fund a school desegregation remedy. But this is not a case which raises questions limited to desegregation issues. Instead, it is a case which asks this Court to focus on the far broader question of the appropriate limits of the remedial power of federal courts and to recognize that, in this case, those limits have been exceeded. The questions presented by the Petitioner, State of Missouri, in its Petition for Certiorari must be addressed in any case in which a constitutional violation is alleged by a plaintiff. The desegregation aspects of the case are but the factual setting for the fundamental questions of the appropriate scope of the courts' remedial authority which are raised herein.

From the point of view of amici states, the decision below is especially troubling for two reasons. First, the Court of Appeals and the district court both failed to make the kind of inquiry necessary to sustain such expansive relief. Neither court attempted to define the scope of the constitutional right at issue, the effects attributable to the state's violation of that right, or the boundaries of a remedy properly tailored to correct those specific effects. At a time when states are under the twin pressures of limited resources and increased demands for services, the courts should be particularly careful in distinguishing between legitimate constitutional remedies, on the one hand, and desirable social policy directives, on the other.

The second troubling aspect of the decision below is, in large measure, an elaboration of the first. The need for a searching judicial inquiry is even greater when, as here, the remedy results from a negotiated agreement by local government units (and their plaintiff citizens), who

then look to the state for involuntary funding. Governmental units and subdivisions have an understandable interest in securing as much of the state dollar as they can. By and large, however, the proper means for addressing this concern is through the political processes, not the federal courts. It is imperative, in the view of the states, that the courts not become embroiled in these budgetary disputes under the pretext of redressing ill-defined constitutional violations.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Imposes Enormous Financial Burdens on a State Without Properly Finding That Such Expenditures Are Required to Redress the Effects of the State's Constitutional Violation.

It is well settled that "a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation." *Milliken v. Bradley,* 418 U.S. 717, 738 (1974). While often articulated, however, this general principle is not always rigorously applied. If a remedy is in fact to be precisely tailored, a federal court must make three discrete but interrelated inquiries: first, what is the content of the right that has been violated; second, what are the effects that have been caused by the violation in question; and third, what remedial steps are necessary to redress the identified effects. *See, e.g., General Building Contractors Ass'n v. Pennsylvania,* 458 U.S. 375 (1982); *Dayton Board of Education v. Brinkman,* 433 U.S. 406 (1977); *Milliken v. Bradley, supra; Swann v. Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971).

The need for a careful inquiry does not rest on a formalistic respect for legal niceties. The plain fact is that in any constitutional case involving a claim for services—be it a school case, or a hospital or prison conditions case—there is necessarily a line at which the appropriate content of a remedy ends and the universal quest for better programs begins. That line may at times be somewhat porous or imprecise, but that consideration only means that *more* care should be taken in assessing the legitimate dimensions of a remedy. Where the right in question is reasonably precise—*e.g.,* the right to trial coun-

sel—or where the state is the only likely cause of a particular constitutional deprivation—*e.g.*, the lack of sanitary conditions in a state-operated hospital—the remedial inquiry can be more readily kept within definable boundaries. But where the right is indeterminate—*e.g.*, a right to treatment—or here causality is unclear—*e.g.*, regression of hospitalized patients—the potential for judicial overreaching is great.

It is hardly surprising, moreover, that judges would seek to preserve their flexibility with respect to remedial decision-making. A federal court necessarily faces only relatively discrete situations—a school system, a hospital, a prison. These individual situations can always be improved, and, as this Court has reminded, judges "have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable . . ." *Bell v. Wolfish*, 441 U.S. 520, 562 (1979). Collectively, these factors exert a not-so-subtle pressure on the courts to err on the side of broad remedial plans.

The problem for the states, however, is that they deal not with a single system or facility, but with many competing claims as well as practical limitations on available resources. For example, the money needed to develop new school programs and buildings in one school district can only come from other school districts, other state programs or new revenues. Since the last option is not infinitely expandable, it is the first two that usually must look to. This redistributive effect of unchecked remedial decision-making tends to take on a life of its own, leading to ever-increasing demands on the states. The requirements embodied in the most demanding decree become the constitutional minimum within (and sometimes even beyond) a particular jurisdiction. In the meantime, those programs that have had their resources depleted in order

to fund the requirements of an existing remedy are likely to decline as a result, and thus themselves become ripe for suit. Alternatively, persons who might otherwise use the traditional political processes to seek better services are likely to find that there are few resources remaining and that they too must seek a judicial order to protect their own particular interests.

This is not to suggest that the federal courts should ignore their constitutional responsibilities. If a violation is found, it should be remedied. But that open-ended remedial process must be cabined by assuring rigorous adherence to the principles set forth earlier: a clear definition of the content of the right; clear findings concerning the causal relationship between the violation and the conditions to be remedied; and relief limited to those acts that are necessary to correct the effects caused by the violation.

When assumptions about the content of rights and the causes of existing conditions become a substitute for thoughtful judicial analysis, the process is almost certain to breed error. And just as importantly, a court cannot simply assume that state action caused a constitutional violation.[1]

For these reasons, it is imperative that a court make the requisite findings *before* imposing relief. Otherwise, a state can be held liable for correcting conditions that it neither created nor was in any way responsible for.

To the extent that conditions result from a constitutional violation, or to the extent that remedial efforts are

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1. As the Court stated in *Milliken v. Bradley, supra,* 418 U.S. at 747, n. 22, "[t]he suggestion . . . that schools which have a majority of Negro students are not 'desegregated' whatever the racial makeup of the school district's population and however neutrally the district lines have been drawn and administered finds no support in our prior cases."

needed to cure the past effects of an *established* violation, judicial intervention is appropriate. *See, e.g., Milliken v. Bradley, supra,* 433 U.S. 267, 283 (1977). Absent these considerations, however, a court must stay its remedial hand. In the present case, this distinction was not even addressed.

We reiterate: (1) the imposition of a remedy must be based upon a clear definition of the content of a constitutional right infringed; (2) courts must make clear findings regarding the causal relationship between a violation found and the conditions to be remedied; and (3) courts must limit the remedy imposed to those efforts which will correct the effects caused by the violation.

The Eighth Circuit failed to adhere to these requirements while approving what is certainly one of the most costly and expansive remedies ever ordered by a federal court. Further review is necessary to correct this fundamental error in approach.

II. Careful Judicial Scrutiny of a Remedial Plan Is Especially Necessary When It Is the Product of a Negotiated Agreement That Includes Political Subdivisions but Not the State.

In addition to the need for the kind of careful judicial scrutiny that should generally attend remedial decision-making, this case presents special considerations meriting even greater attention. The remedy adopted was essentially negotiated by local government units who then asked the district court to require the State to pay for most of what was in their agreement. This process should have alerted the courts below to the potential for overreaching by parties who would obviously be eager for more services, especially when they did not have to pay for them.

Rather than remaining alert to this concern, however, the lower courts evidently thought that *less* judicial scrutiny was needed because the relief was embodied in a settlement agreement. As the district court put it, "[f]inding parties, as diverse as those present here, reaching such a degree of unanimity as has been achieved by the proponent plaintiffs and the twenty-three St. Louis school districts, would give any court pause before disapproving the efforts of these parties to find a voluntary solution to a complex constitutional problem in which legal, education, political, and financial problems are inextricably intertwined." Pet. App. 108a.[2] The Court of Appeals similarly noted the importance of the "unique and comprehensive settlement agreement. . ." Pet. App. 13a. See Pet. App. 32a.

In our view, the courts below viewed the case backwards. By concentrating on the virtue of voluntary remedial agreements rather than the vice of involuntary funding orders, both the district court and the Court of Appeals improperly sanctioned the use of the judicial process to reconstruct the traditional relationship between state and local governments. In particular, at least in cases where a state has been found to have committed a violation, the approach below would permit local governments to bargain away some of their own right to govern in return for an agreement that will protect or improve their financial positions. Worse yet, perhaps, it would give local governments the ability to secure additional services by

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2. The court also stated that "[s]ociety's greatest opportunities lie in encouraging human inclinations toward compromise, rather than stirring our tendencies for competition and rivalry. If lawyers, educators, and public officials do not help marshal cooperation and design mechanisms that promote peaceful resolution of conflicts, we have missed an opportunity to participate in the most creative social experiments of our time." Pet. App. 107a (citation omitted).

dressing them up in a so-called "settlement agreement." The facts of the instant case demonstrate that these concerns are not fanciful.

The City Board, itself having been found liable for precisely the same violation as the State, decided that it could best protect its interests by switching sides and placing itself in an affirmative posture with respect to relief. It thus became a plaintiff in an expanded metropolitan-wide suit that included the suburban school districts as defendants.[3] The suburban school districts, in turn, faced with a potential judgment that could have both financial and autonomy implications,[4] "agreed" to large numbers of interdistrict transfers. This would have been acceptable, of course, if the suburban districts had (along with the City Board) also agreed to pay for these transfers. But, rather than taking on that responsibility, these governmental units used the federal court to shift financial responsibility to the State. Indeed, not satisfied with requiring the State merely to pay the cost of transfers, the city and suburban boards added in state-funded "incentive payments" so as to further improve their financial positions.

The nature of the settlement process similarly skewed the other components of the remedy. For example, the City Board added in a host of educational programs and capital improvements that might well be desirable *if* funding were unlimited. Predictably, the plaintiffs em-

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3. The City Board's status as plaintiff, even in a metropolitan-wide suit, seems dubious. It is difficult to see what rights it had that could have been violated. Because of the way in which the intradistrict and interdistrict claims were merged, however, this issue was not addressed.

4. Before the interdistrict liability claims had been resolved, the district court announced that, if a violation was found, it would dissolve the independent school districts, create a single metropolitan district, and impose a uniform tax rate. Pet. App. 19a

braced these efforts and the suburban districts did not object to them. Pet. App. 183a-184a. As Judge Bowman pointed out, "[n]one of [the parties] had any real incentives to prevent the others from piling their plates high with programs and funds that would benefit their school systems." Pet. App. 97a (dissenting opinion). The majority decision, however, gave no weight at all to this consideration.[5]

Quite apart from the merits of the programs themselves, the Court of Appeals also paid little attention to the disproportionate share of funding exacted from the State. Nowhere does the court explain, for example, why the costs of compliance should be as they were set forth in the settlement, which leaves the State with 100 per cent of many of the costs. If, as the court ruled, the remedy is required to correct the violation in the city, there is no reason given to explain why two co-violators—the City Board and the State—should be assigned disparate financial responsibility. Likewise, to the extent that the remedy simultaneously served to resolve the outstanding claims against the suburban school districts, there is no explanation about why they should not have to bear any financial responsibility. See Pet. App. 86a (Gibson, J., dissenting) ("The county school districts profit immeasurably by the settlement agreement, as nearly all of the funding obligation is placed upon the State and they are

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5. While the specific issue of territorial limits on relief is most likely to arise in school and housing discrimination cases, the general concerns described in text are relevant in other situations as well. For example, in a case where counties have responsibility for deciding whether to place mentally disabled people in institutional or community residences, and plaintiffs seek to increase reliance on the latter, the counties may well be willing to agree with plaintiffs if the state can be required to pay for the community placements that the plaintiffs and counties mutually design. The behavior of the St. Louis City Board in this case is of a similar quality.

relieved of the risk of being found to have in any way contributed to any interdistrict violation.").[6] It certainly would appear likely that if funding responsibilities had been allocated differently the parties would have been less willing to embrace such a far-reaching remedy.

In sum, rather than taking comfort from the partial acquiescence achieved through the settlement agreement, the courts below should have cast a skeptical eye at a remedy produced through an obviously biased process. At a time when local governments are becoming increasingly dissatisfied with the level of state funding available for their programs, it is all too easy to secure their agreement to constitutional remedies calling for services that they do not have to fund. Indeed, local governments that seek more staff, better buildings and other programatic improvements have every reason to settle with plaintiffs—even if such a settlement restricts their autonomy or programatic discretion—when the costs of these benefits can be involuntarily shifted to the state. For these reasons, "the need for judicial alertness and careful fact-finding, [is] especially critical in this case." Pet. App. 93a (Bowman, J., dissenting). The failure to satisfy this need merits further review.

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6. The Court of Appeals made "clear that the suburban schools meeting the goals set forth in the [settlement] plan will receive a final judgment declaring that they have satisfied their desegregation obligations." Pet. App. 15a. This result would appear to be a curious by-product of a remedy designed to redress a violation affecting only city students.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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